

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

LEIGH D. MENKES,

Plaintiff,

v.

SAINT JOSEPH CHURCH a/k/a
ST. JOSEPH CHURCH; SAINT
JOSEPH PARISH; CATHOLIC
DIOCESE OF WILMINGTON, INC.;
MARTIN A. DE SAPIO, AIA;
MARTIN A. DE SAPIO;
W.S. CUMBY & SONS, INC.

Defendants,

v.

W.S. CUMBY & SONS, INC., a
Pennsylvania Corporation,

Third-Party Plaintiff/
Defendant,

and

SAINT JOSEPH CHURCH a/k/a
ST. JOSEPH CHURCH; SAINT
JOSEPH PARISH,

Third-Party Plaintiff/
Defendant,

v.

JMG WELDING & FABRICATING
SERVICES, INC.,

Third-Party Defendant.

C.A. No. 09C-03-289 WCC

Submitted: December 1, 2010

Decided: March 18, 2011

OPINION

On JGM Welding and Fabricating Services, Inc.'s Motion to Dismiss - DENIED

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Patrick C. Lamb, Esquire; Marks, O'Neill, O'Brien & Courtney, P.C., 1800 John F. Kennedy Blvd., Suite 1900, Philadelphia, PA 19103. *Pro Hac Vice* Attorney for Third-Party Defendant JGM Welding and Fabricating Services, Inc.

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CARPENTER, J.

Before this Court is Third-Party Defendant JGM Welding & Fabricating Services, Inc. (“JGM”’s) Motion to Dismiss Third Party Complaints brought against it by W.S. Cumby & Sons, Inc. (“Cumby”) and St. Joseph’s Parish & Church (“St. Joseph’s”) (collectively, “Third-Party Plaintiffs”). At issue is whether a subcontractor may be held liable to the general contractor and/or owner of the construction site for alleged negligence contributing to the injuries of its employees under an indemnification clause in its contract with the general contractor. The Court finds that, under the circumstances of this case, it can. Accordingly, JGM’s Motion to Dismiss the Complaints brought by Cumby and St. Joseph’s will be denied.

Facts

JGM’s Motion to Dismiss arises out of a personal injury lawsuit brought by Plaintiff Leigh Menkes (“Menkes”), a resident of Ephrata, Pennsylvania and an employee of JGM. Menkes suffered numerous personal injuries while working for JGM on a construction site at St. Joseph’s Church in Middletown, Delaware in 2007. Menkes’ employer, JGM, had been hired by Cumby, the general contractor on the St. Joseph’s project, to perform steel erection and sheet metal work at the site. On April 3, 2007, Menkes was assigned to trim back the edge of metal decking on an elevated portion of the church building that was under construction. The task required Menkes to work on an elevated surface six feet above the level

below. The metal decking that comprised Menkes' work area on that day contained multiple holes which were designed to accommodate mechanical equipment for the building's ventilation system. Menkes fell through an uncovered hole, causing numerous injuries to his back and lower left leg. Menkes subsequently filed this personal injury lawsuit in this Court on March 27, 2009 against Cumby, St. Joseph's, and various other entities associated with the St. Joseph's construction project. Menkes alleged that Cumby and St. Joseph's both negligently failed to provide protective equipment that might have prevented his fall. Menkes did not name JGM as a defendant in his original Complaint. As an employee of JGM who was injured in the course of employment, Menkes received workers' compensation benefits in connection with his injuries and the recovery against his employer is limited to these benefits.

Cumby, the general contractor, entered into a Subcontract Agreement ("Agreement") with JGM on October 19, 2006. The Agreement contained an indemnification provision, which required JGM to assume "entire responsibility and liability for any and all claims and/or damages of any nature or character whatsoever with respect to the Subcontractor's Work"¹ and further required JGM

¹ Agreement §7.1. The entire Indemnification clause reads as follows:

The Subcontractor assumes entire responsibility and liability for any and all claims and/or damages of any nature or character whatsoever with respect to the Subcontractor's Work (including, but not limited to, work performed under the Subcontract, work performed under change order, or any other work incidental thereto,

“to defend, indemnify, and hold harmless the Contractor (its affiliates, parents and subsidiaries), the Contractor’s surety, if any, the Owner, Owner’s Representative (if any) and the Architect from and against all claims, demands, liabilities, interest, loss, damage, fines, penalties, attorneys’ fees, costs and expenses of whatever kind or nature, including property damage or for personal injuries (including death) to any and all persons....”² even if these injuries were caused by the negligence of the contractor. Finally, the Agreement also expressly requires the Subcontractor to perform its work in a workmanlike manner.³

Third-Party Plaintiff/Defendant Cumby filed its Third-Party Complaint along with its Answer on July 13, 2009. Cumby alleged that JGM had an obligation under Article 7 of the Subcontract Agreement to defend, indemnify and hold harmless Cumby from lawsuits such as the one filed by Menkes and that JGM

whether performed at or off the project site, or work performed by the Subcontractor and/or its subcontractor and/or suppliers using the Contractor’s machinery, equipment, and/or tools [including but not limited to scaffolding, hoists, and/or lifts]). The Subcontractor agrees to defend, indemnify, and hold harmless the Contractor (its affiliates, parents and subsidiaries), the Contractor’s surety, if any, the Owner, Owner’s Representative (if any) and the Architect from and against all claims, demands, liabilities, interest, loss, damage, fines, penalties, attorneys’ fees, costs and expenses of whatever kind or nature, including property damage for personal injuries (including death) to any and all persons (whether such persons are employees of the Contractor or employees of the Subcontractor, or employees of the Subcontractor’s subcontractors or suppliers, or others), resulting from the Subcontractor’s Work as described above, arising therefrom or occurring in connection therewith, and whether caused by the negligent, or other, acts or omissions of the Contractor, the Subcontractor, the Subcontractor’s subcontractors and/or suppliers, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether any such claims, demands, etc. are caused in part, by a party indemnified hereunder.

² *Id.*

³ Agreement §2.8(a) provides, in relevant part, “Every part of the Subcontractor’s Work shall be executed in strict accordance with the Contract Documents in the most sound, workmanlike, and substantial manner.”

had breached its contractual obligation to indemnify Cumby by failing to accept its written tender of defense and indemnification. Cumby also alleged that JGM had breached its obligation under Article 8 of the Subcontract Agreement to maintain commercial general liability insurance for personal injury under a policy that included Cumby as an “Additional Insured.”

Third-Party Plaintiff/Defendant St. Joseph’s Church subsequently filed its own Third-Party Complaint against JGM on August 24, 2010, also alleging breach of the Subcontract Agreement. St. Joseph’s alleged that it is a third-party beneficiary of Article 7 of the Subcontract Agreement, which required JGM to defend, indemnify and hold harmless St. Joseph’s against any and all claims, including claims for personal injuries brought by employees of JGM. St. Joseph’s also alleged that Article 8 required JGM to maintain general liability insurance naming St. Joseph’s as an “Additional Insured.”⁴

JGM filed a Motion to Dismiss the Third-Party Complaints brought by Cumby and St. Joseph’s on October 7, 2010. After oral argument, at the Court’s request, the parties submitted supplemental letter briefs to address the current state of the law with respect to recovery against an employer under a theory of joint and

⁴ There appears to be significant factual disputes regarding whether JGM obtained the necessary insurance to satisfy Article 8 of the contract and whether Cumby/St. Joseph has taken appropriate action to avail itself of that coverage. As such, the Court does not believe it has a sufficient record to grant a motion to dismiss on this issue, and the Opinion will not address the matter.

several liability where the employer has contractually agreed to indemnify a defendant in a lawsuit and where a jury could find that both the employer's and the defendant(s)'s negligence contributed to the plaintiff's injuries.

Standard of Review

JGM has filed a Motion to Dismiss under Superior Court Civil Rule 12(b)(6), alleging failure to state a claim upon which relief can be granted.⁵ When evaluating a motion to dismiss for failure to state a claim, the Court must assume the truthfulness of all well-pleaded allegations in the complaint.⁶ A motion to dismiss for failure to state a claim will not be granted unless the complaint is “clearly without merit,” whether in law or in fact.⁷ Where a motion to dismiss has been brought at a preliminary stage of the proceedings, the Court must determine with “reasonable certainty” that no set of facts can be inferred from the pleadings upon which the plaintiff could prevail.⁸ The Court must also give the plaintiff “the benefit of all reasonable inferences that can be drawn from its pleading” when reviewing a motion to dismiss.⁹

⁵ Super. Civ. R. 12(b)(6).

⁶ *Solomon v. Pathe Communications Corp.*, 672 A.2d 35, 38-39 (Del. 1996).

⁷ *Diamond State Tel. Co. v. University of Delaware*, 269 A.2d 52, 58 (Del. 1970).

⁸ *Id.*

⁹ *In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991).

Discussion

JGM raises two main substantive arguments in support of its Motion to Dismiss. First, JGM argues that the Indemnification Clause in the contract is void as a violation of Delaware public policy. Third-Party Plaintiffs respond that the Clause is enforceable and that any invalid language is severable. Second, JGM argues that workers' compensation exclusivity prevents it from being subject to tort liability in a case such as this.

a. Indemnification Clause

First, JGM argues that the indemnification clause is invalid as a matter of law because it violates public policy. Under Delaware law, a general contractor in a construction contract cannot assign its liability for its own wrongdoing to a third party.¹⁰ However, the presence of language assigning the general contractor's own liability to another party does not always invalidate the entire indemnification clause of a contract. Whether an indemnification contract clause remains enforceable depends on whether the offensive language can be stricken from the contract so that the remaining obligation under the contract would be valid under Delaware law.

¹⁰ 6 *Del. C.* §2704(a) provides, in relevant part, that a promise "relative to the construction" of any type of building or structure in the State, "purporting to indemnify or hold harmless the promise or indemnitee or others, or their agents, servants and employees, for damages arising from liability for bodily injury or death to persons [...] caused partially or solely by [...] the negligence of such promise or indemnitee or others than the promisor indemnitor [...] is against public policy and is void and unenforceable[.]"

Here, it is clear that the Indemnification Clause of the Agreement is invalid to the extent that it purports to impose a duty on JGM to indemnify Cumby and/or St. Joseph's for their negligence.¹¹ The question, therefore, is whether the indemnification clause can survive if the illegal portion is stricken from the Agreement. Cumby and St. Joseph's rely principally on *Handler v. State Drywall Co.*,¹² in which the contractual provision at issue required Drywall to "fully indemnify, protect and hold harmless the Company, its agents and employees from and against all loss, damage or expense, including attorney's fees, as to all claims, damages, or liabilities resulting from accident, negligence, *including the Company's negligence....*"¹³ The Court concluded without difficulty that the exculpatory provision requiring indemnification for Handler's own negligence was void.¹⁴ However, the Court also noted the presence of a severability clause in the subcontract agreement and found that the remainder of the indemnification section could be enforced.¹⁵

¹¹ See Agreement, Article 7.

¹² 2007 WL 3112466 (Del. Super. Sept. 27, 2007).

¹³ *Id.* at *2 (emphasis added).

¹⁴ *Id.*

¹⁵ *Id.*

JGM relies on the U.S. District Court’s decision in *Kempski v. Toll Bros., Inc.*,¹⁶ where the Court, applying Delaware law, invalidated an indemnification provision in a construction contract as violating 6 *Del. C.* §2704(a). The indemnification provision at issue in *Kempski* required the subcontractor to indemnify, defend, and hold harmless Toll Brothers, Inc. from and against “all claims damages, losses, and expenses... arising out of or resulting from the performance, existence or condition of the Work under the Contract Documents.”¹⁷ The *Kempski* court found that the indemnification provision at issue was unenforceable, reasoning that “the duties to indemnify for the conduct of [the general contractor] and the actions of [DHAC] are expressed together as a single obligation, and are not severable....”¹⁸ The *Kempski* court specifically distinguished the clause before it from the one involved in *Handler*, noting that the *Handler* indemnification provision included “two distinct clauses within the indemnification provision describing two separate duties: one clause required the subcontractor to indemnify the contractor for the contractor’s negligence; the other clause required the subcontractor to indemnify the contractor for the

¹⁶ 582 F.Supp.2d 636 (D.Del. 2008).

¹⁷ *Id.* at 638.

¹⁸ *Id.* at 644.

subcontractor's own negligence, including vicarious liability."¹⁹ Accordingly, the *Kempski* court concluded, the indemnification obligations in that case were not distinct or distinguishable and thus could not be severed. JGM argues that section 7.1 of the Agreement more closely resembles the contractual provision involved in *Kempski* and the invalid language cannot be stricken from the contract without rewriting the indemnification clause.

After considering the arguments of counsel, the Court agrees with Cumby and St. Joseph's. This contract contains a severability provision,²⁰ which permits the Court to sever invalid language while preserving the parts of the provision that do not violate Delaware law. Furthermore, the provision expressly requiring JGM to indemnify the negligence of other parties to the contract (including Cumby and St. Joseph's Church) is a separate and distinct portion of the indemnification provision and can easily be removed without affecting the legal requirement that JGM indemnify for its own negligence. In addition, the invalid exculpatory clause may be stricken from the contract without disturbing the other provisions of the contract. As such, the Court will strike the following language from section 7.1 of the Agreement:

¹⁹ *Id.* at 643.

²⁰ Agreement, Article 2.1(a).

[A]nd whether caused by the negligent, or other, acts or omissions of the Contractor, the Subcontractor, the Subcontractor's subcontractor's and/or suppliers, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether any such claims, demands, etc. are caused in part, by a party indemnified hereunder.

The other provisions of section 7.1 remain enforceable.

b. Workers' Compensation Exclusivity

JGM next argues that the Third-Party Complaints should be dismissed because they are barred by workers' compensation exclusivity. Under Delaware law, workers' compensation provides the sole remedy for employees against the employer when they are injured in the course of their employment.²¹ Workers' compensation pre-empts any potential tort cause of action that might be brought against an employer by an injured employee.²² Workers' compensation exclusivity also prevents an employer from being held liable under the doctrine of joint and several liability where multiple parties may have contributed to an employee's injuries. Under the Uniform Joint Tortfeasors Contribution Act,²³ joint tortfeasors must all be liable to the same person asserting the claim in order to enforce contributions. Thus, an employer cannot be held jointly liable to an employee for

²¹ 19 *Del. C.* §2304 provides, "Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies."

²² *Id.*

²³ 10 *Del. C.* §6301.

injuries sustained in the course of employment, even if the employer's negligence contributed to the employee's injuries.²⁴ JGM argues that, even if a jury were to find that its negligence contributed to Menkes' injuries, it could not be held liable under joint and several liability because it was Menkes' employer, and therefore there is no basis for Cumby and/or St. Joseph's to recover from it. In response, Cumby and St. Joseph's argue that they can recover from JGM because their complaint against JGM is based on the contractual indemnification provision and not on a tort theory of negligence.

The Delaware Supreme Court addressed the issue of whether an employer may be liable to third parties for an employee's injuries on the basis of a contractual indemnification clause in *Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.*²⁵ There, Standard Chlorine hired Precision Air to perform a service at Standard's chemical production plant. The contract between Standard and Precision contained an indemnification clause and a clause requiring Precision to perform the work in a "safe, good, substantial and workmanlike manner."²⁶ The plaintiff in the underlying action in *Precision Air*, an employee of Precision Air, was injured while working at the Standard Chlorine plant and brought a personal

²⁴ *Diamond State Tel.*, 269 A.2d at 56.

²⁵ 654 A.2d 403 (Del. 1995).

²⁶ *Id.* at 405.

injury action against Standard. In turn, Standard then brought a third-party complaint against Precision Air seeking contribution and/or indemnification pursuant to the contract. The Court rejected Standard’s contribution claim because “the substantive basis for such recovery would be Precision’s liability as a joint tortfeasor.”²⁷ However, the Supreme Court affirmed the Superior Court’s denial of the motion to dismiss the third-party complaint based on the indemnification provision, holding: “An employer, even though it has paid workmen’s compensation benefits to an injured employee, can be held contractually liable to a third party where a contract between the employer and third party contains provisions requiring the employer to: (i) perform work in a workmanlike manner; and (ii) indemnify the third-party-indemnitee for any claims arising from the employer-indemnitor’s own negligence.”²⁸ The Court explained that Precision’s (potential) liability to Standard was not based in tort but “an ‘independent duty’ based on the contract law principle of indemnification.”²⁹

The Agreement between Cumby and JGM meets the requirements for a third-party contractual indemnification action against an employer as set forth in *Precision Air*. The contract contains a provision requiring that “[e]very part of the

²⁷ *Id.* at 407.

²⁸ *Id.* at 407.

²⁹ *Id.* at 408.

Subcontractor's Work shall be executed in strict accordance with the Contract Documents in the most sound, workmanlike, and substantial manner."³⁰ The Agreement also contains express language requiring JGM to indemnify Cumby and/or St. Joseph's. The present case is factually similar to the *Precision Air* case in that it involved injury to an employee whose employer had contracted with another party to perform services. Accordingly, there is a basis in law, under the terms of the Agreement between Cumby and JGM, for the third-party indemnification actions brought by St. Joseph's and Cumby.³¹

Having made this determination, the issue is how will the indemnity obligation be determined. A footnote from *Precision Air* is helpful: "Only the **extent** of Precision's indemnification obligation (i.e., damages) will be decided using the tort principle of negligence, not the **basis** of Standard's recovery - namely, the breach of contract."³² Thus, the extent, if any, of JGM's negligence in causing the injuries to its employee, together with the potential negligence of the

³⁰ Agreement, Article 2.8(a).

³¹ The Court notes that under the *Precision Air* case, either the plaintiff's complaint or the third-party complaint must put in issue the employer's negligence for the indemnification clause to apply. While unartfully stated, the Court finds the paragraph in each third-party complaint that states, "Third-Party Plaintiff/Defendant believes and avers that the incident complained of by Plaintiff is precisely the kind of incident that falls directly within the scope of Article 7 of the Subcontract Agreement such that Third-Party Defendant is obligated to defend, indemnify, and hold harmless Third-Party Plaintiff/Defendant," meets the minimum threshold to satisfy this requirement. The Court would suggest that counsel be more precise in asserting the indemnitor's negligence in future pleadings.

³² *Id.* at 409, n. 5.

Defendants, will be a question for the jury to decide. Subsequently, to the extent JGM is found liable, the total award will be reduced by the percentage of JGM's negligence and this will be the extent of their indemnification under the contract. The Motion to Dismiss is therefore DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr. _____